of the defendants. The claim of the plaintiff for damages at common law therefore fails.

I now come to deal with the alternative claim of the plaintiff based on a breach of statutory duty by the defendants.

In the statement of claim the particulars of the breach of statutory duty of the defendants was pleaded as "contrary to section 25 of the Factories Act the defendants failed to completely encase the said machinery.", but at the trial the section relied upon is section 22(1) of the Factories Ordinance, 1958.

Section 22(1) provides:—

"Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced:

Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part."

The case of the plaintiff is that the defendants failed to fence the saw so as to prevent the danger of a tooth from the saw which has broken off from being ejected by the machine and causing injury.

For the defendants it is submitted that the obligation to fence under section 22(1) is an obligation only to protect against direct injury by contact with the dangerous part of the machine and not against injury from something that flies off from the machine.

On consideration of the terms of section 22 I am of the opinion that the obligation to fence imposed by subsection (1) is an obligation to provide a guard against contact with any dangerous part of a machine and that it does not impose any obligation to guard against dangerous materials or articles ejected from the machine (See *Nicholls* v. *Austin (Leyton) Ltd.*,[3] and *Close* v. *Steel Co. of Wales Ltd.*[4]).

From the evidence that I have, I am of the view that the defendants have complied with section 22(1) in that every precaution has been taken for the safe operation of the band-saw. It is true that the exposed part of the saw was not fenced but the nature of the operation prevents a guard to be fixed and there is no danger of the workmen coming into contact with the exposed saw as they would be standing some distance away from the saw when working and they do not have to get near the saw at all. No fencing would be sufficient to prevent a broken tooth of the saw from flying out.

This accident is unusual and it is not one which could have been foreseen by the defendants.

In the result the plaintiff's claim fails and is dismissed with costs.

Claim dismissed.

Solicitors: *J. Tan Chor Yong & Co.; Ng & Ng.*

WONG KIM NEO v. YEO BOON JOO

[O.C.J. (Gill J.) July 29, 1968]
[Malacca — Civil Suit No. 129 of 1965]

Contract — Agreement to sell house — Payment of more than 20% of agreed price — Failure to pay balance — Defendant in possession for over 3 years — Recission by vendor — Forfeiture of deposit.

The defendant agreed with the plaintiff by an agreement dated December 5, 1964 to purchase No. 74J Templer Avenue, Malacca at the price of $15,000. The deposit of $4,000 was to be paid on the signing of the agreement, a further sum of $1,000 on December 13, 1964, a sum of $3,000 by 24 equal monthly instalments of $125 each the first of such instalment to be paid on January 14, 1965 and the balance of $7,000 was to be paid towards the discharge of a loan due from the plaintiff to the Oversea Chinese Banking Corporation Ltd. on a security of the said premises together with interest falling due thereon every month as from December 14, 1964.

The defendant paid the deposit of $4,000 on signing of the agreement and a further sum of $900 on December 13, 1964 but he failed to pay any other amounts stipulated under the agreement. The plaintiff thereupon commenced proceedings against the defendant for specific performance of the agreement, damages and other consequential reliefs or alternatively for rescission of the agreement and the forfeiture of moneys paid to him. The court by way of specific performance ordered an account to be taken of what was due to the plaintiff and for the execution of the transfer by the plaintiff which was to be delivered to the defendant in exchange for the amount due under the agreement at a date to be fixed in the office of the assistant registrar. The defendant failed to appear on the appointed date. The plaintiff then applied by motion for the agreement of December 5, 1964 to be rescinded and the sum of $4,900 to be forfeited and for the defendant to deliver up vacant possession of the premises to the plaintiff.

Held: (1) the plaintiff was entitled to recission of the contract. *Hall* v. *Burnell*[1] applied;

(2) in view of the fact that the defendant had been in possession for nearly 3½ years it was just and reasonable that the sum of $4,900 be forfeited to the plaintiff.

Cases referred to:—

(1) *Hall* v. *Burnell* [1911] 2 Ch. 551.

(2) *Howe* v. *Smith* [1884] 27 Ch. D. 89.

CIVIL SUIT.

John Ang Soon Ho for the plaintiff.

Defendant in person.

Cur. Adv. Vult.

Gill J.: This was a motion by the plaintiff for an order that an agreement in writing dated

5th day of December, 1964, whereby it was agreed that the plaintiff should sell and the defendant should purchase the parcel of land situate at Templer Avenue, Malacca marked Lot No. 327, town area XXIX together with the house and premises erected thereon known as No. 74J Templer Avenue, Malacca, be rescinded, that the deposit and other monies amounting to $4,900 paid by the defendant under the terms of the said agreement be forfeited to the plaintiff and that the defendant do vacate and deliver up vacant possession of the said land and premises to the plaintiff.

The agreed purchase price for the land in question was $15,000, of which a sum of $4,000 was to be paid as deposit on the signing of the agreement, a sum of $1,000 on the 13th of December, 1964, a sum of $3,000 by 24 equal monthly payments of $125 each first of such payment to be made on the 14th day of January, 1965, and a sum of $7,000 was to be paid towards discharge of the loan due from the plaintiff to the Oversea Chinese Banking Corporation Limited, Malacca on the security of the said land and premises together with interest falling due thereon every month as from 14th December, 1964.

The defendant made payment of the deposit of $4,000 under the agreement and was let into possession of the said land and premises. As to the sum of $1,000 to be paid on 13th December, 1964, he paid $900, and he failed to pay any of the other amounts stipulated under the agreement.

Upon default by the defendant to make payments under the agreement as aforesaid, the plaintiff commenced this action on 12th August, 1965 for specific performance of the agreement, damages for breach of contract in lieu of or in addition to specific performance and a declaration that he was entitled to a lien on the said land and premises for the unpaid balance of the purchase price payable under the said agreement. There was a claim in the alternative for rescission of the said agreement, a declaration that the money paid by the defendant to the plaintiff as aforesaid had been forfeited to the plaintiff and for an order for delivery up of vacant possession of the said land and premises.

The writ on which was endorsed the statement of claim as aforesaid was served on the defendant on 25th August, 1965 to which he entered no appearance. On 8th February, 1966 the plaintiff took out a summons in chambers pursuant to Order 14A of the Rules of the Supreme Court, 1957 asking for an order in terms of the prayers set out in his statement of claim. The hearing of this summons in chambers was adjourned from time to time but eventually on 4th March, 1967 the court by way of specific performance of the agreement made an order for an account to be taken of what was due to the plaintiff in respect of the said purchase money together with the interest, for the plaintiff to prepare and execute a memorandum of transfer which was to be delivered to the defendant and for the defendant at the same time and place to pay to the plaintiff the amount due under the agreement.

There was considerable delay in the court order being finalised for reasons which need not be set out, but it was eventually ordered that the plaintiff do appear in the chambers of the assistant registrar on 18th March, 1968 at 10.00 a.m. with the memorandum of transfer with all deeds and writings in her possession or power relating solely to the land in question, and that the defendant do appear on the same date and pay the plaintiff the balance of the purchase price. A copy of the order was served on the defendant. The plaintiff attended the assistant registrar of the court on 18th March, 1968 as directed to receive the balance of the purchase price from the defendant and thereupon to deliver the duly executed transfer to the defendant but the defendant failed to do so.

On 19th March, 1968 the plaintiff took out the present notice of motion asking for the orders specified therein relating to rescission of the agreement, forfeiture of the money paid and vacant possession. The notice of motion was served on the defendant, and all that he had to say at the hearing of the motion was that he had no money and that he be allowed to pay the balance of the purchase price by monthly instalments.

In considering the motion for rescission of the contract I had to consider whether an order in terms of the motion could be made in view of the previous order for specific performance of the agreement. In this connection counsel for the plaintiff drew my attention to the case of *Hall* v. *Burnell* [1] in which such an order was made in circumstances similar to the circumstances in the present case. I regard that case as an authority for the proposition that where the court makes an order for specific performance of an agreement whereby the vendor is to deliver a memorandum of transfer duly executed together with the title deeds and the purchaser is to pay the balance of the purchase price, in default of the purchaser in completing the purchase the vendor is entitled to a rescission of the contract. It was decided in that case that the deposit paid upon a contract between a vendor and purchaser is in the nature of an earnest or guarantee for the fulfilment of the contract as well as a part payment of the purchase money, and that a vendor obtaining rescission owing to default in completion by the

purchaser is entitled to the deposit in the absence of any express stipulation to the contrary in the contract.

The contract in the present case contained no express stipulation as to what was to become of the deposit in the event of the purchaser making default. Money paid as a deposit must, however, according to the view expressed by Fry F.J. in *Howe* v. *Smith*,[2] be paid on some terms implied or expressed, and in a case where no terms are expressed it becomes necessary to inquire what terms are to be implied. The answer to this inquiry is to be found in the words which follow the statements in the judgment of Fry L.J. to which I have just referred. They are as follows (at page 101) :—

"The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the prayer to perform the rest of the contract."

The observations of Cotton L.J. are to the same effect when he says (at page 95) :—

"What is the deposit? The deposit, as I understand it, and using the words of Lord Justice James, is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase-money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then, according to Lord Justice James, he can have no right to recover the deposit."

Bowen L.J. said in the same case (at page 98) :—

"We have therefore to consider what in ordinary parlance, and as used in an ordinary contract of sale, is the meaning which business persons would attach to the term "deposit." Without going at length into the history, or accepting all that has been said or will be said by the other members of the court on that point, it comes shortly to this, that a deposit, if nothing more is said about it, is, according to the ordinary interpretation of business men, a security for the completion of the purchase. But in what sense is it a security for the completion of the purchase? It is quite certain that the purchaser cannot insist on abandoning his contract and yet recover the deposit, because that would be to enable him to take advantage of his own wrong. Mr. Pearson said the rule is different when the purchaser does not insist on abandoning his contract, but, on the contrary, is desirous, at the moment he appears before the court, of completing it, and therefore neither the principle nor the decisions apply — that this is not a case where the purchaser is receding from the contract, but on the contrary he is seeking to enforce it. It seems to me the answer to that argument is that although in terms in a case like the present the purchaser may appear to be insisting on his contract, in reality he has so conducted himself under it as to have refused, and has given the other side the right to say that he has refused, performance. He may look as if he wished to perform, but in reality he has put it out of his power to do so — he has, in the language of the *Roman* law, receded from his contract."

As the defendant in the present case had paid more than 30% of the agreed purchase price I felt a bit hesitant at first to make an order for a forfeiture of the whole amount, but in view of the fact that he had been in possession of the premises from the date of the agreement for a period of very nearly three years and six months I considered it just and reasonable that the whole amount should be forfeited to the plaintiff.

For the reasons I have stated and in all the circumstances of the case I made an order in terms of the motion by the plaintiff.

Order in terms.

Solicitors: *Sault, Keith Sellar & Co.*

SUNDARAM v. CHEW CHOO KHOON

[O.C.J. (Chang Min Tat J.) July 29, 1968]
[Ipoh — Civil Suit No. 232 of 1967]

Moneylenders — Suit for declaration that charges executed were void — Application to stay proceedings on the grounds of frivolity and vexation — Plea of estoppel — Whether proper.

Practice and Procedure — Pleading evidence and not material facts — Striking out of objectionable parts — R.S.C. 1957 O. 19 r. 4.

Evidence — Estoppel — Consent judgment — When cannot give rise to estoppel.

The plaintiff brought an action against the defendant for a declaration that the 3 charges executed by him in favour of the defendant over a piece of land at Sungei Siput for $30,000, $20,000 and $10,000 respectively were void and unenforceable by reason of the defendant being an unlicensed moneylender and for ancillary reliefs. The defendant (who had not filed a defence) sought in this application an order to stay all further proceedings in the action on the grounds of frivolity and vexation and abuse of the process of court or alternatively to amend or strike out certain paragraphs of the statement of claim on the grounds that they were contrary to the rules of pleading and an abuse.

It was contended in support of the first ground on behalf of the defendant that the plaintiff was estopped from relying on the allegations that the defendant was an unlicensed moneylender and of fraud by the consent judgment in the earlier action between the parties namely Ipoh Civil Suit No. 494 of 1965.

Held: (1) there was nothing in the consent judgment in Ipoh Civil Suit 494 of 1965 which necessarily and with complete precision decided the issue in the case in question. The defence in the said suit referred to the three charges but the nature and character of the charges were not then called in question. The said consent judgment cannot give rise to an estoppel to exclude a plea based on the Moneylenders Ordinance;

(2) in pleading facts other than the actual rate of interest charged and in pleading the negotiations which took place between the defendant and the plaintiff's brother, the plaintiff was pleading evidence and not material facts. The second objection therefore succeeds.